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August 23, 2012

**VIA E-MAIL & CERTIFIED MAIL**

Thomas A. Benson  
Trial Attorney  
Environmental Enforcement Section  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611

Mr. Craig Melodia  
Associate Regional Counsel  
U.S. Environmental Protection Agency - Region 5  
77 West Jackson Boulevard (C-14-J)  
Chicago, IL 60604-3590

**Re: Ashland Site – NSPW Efforts to Secure Access**

Dear Messrs. Benson & Melodia:

On behalf of Northern States Power Company (“NSPW” or the “Company”), this letter follows our telephone conference of August 16, 2012, regarding NSPW’s efforts to obtain access to the Uplands RD/RA area (the “Uplands”) of the Ashland/Northern States Power Lakefront Site (the “Site”). As you know, Paragraphs 27-28 of the Uplands Consent Decree (the “Decree”) define the Company’s obligations with respect to obtaining access to portions of the Phase 1 Project Area that are neither owned nor controlled by NSPW. As we discussed, and as set forth more fully below, the City of Ashland, Wisconsin (the “City”) is not cooperating with NSPW on several basic (and presumably non-controversial) issues related to Site access, and the City is now refusing to negotiate in good faith regarding the terms of an access agreement. For these reasons, NSPW is requesting the assistance of the United States in resolving access to the Site so that NSPW may proceed with implementing the Decree.

Additionally, Wisconsin Central Limited (“WCL”) has been largely nonresponsive to our attempts to arrange for access to portions of the Site which they own and/or control. However, on August 20, 2012, we received a revised proposed access agreement from WCL, which is under review. NSPW may request the assistance of the United States in resolving access with WCL at a later date following our review of WCL’s most recent draft.

## The City

NSPW has made repeated and consistent efforts to work cooperatively with the City to resolve access to the Site. We first initiated access negotiations in June of 2011 – more than a year ago. Since that time, we have proactively reached out to the City on multiple occasions in an effort to reach an agreement, we have conceded on numerous issues to appease the City's concerns, and we have encouraged a cooperative process for negotiations. In every sense, NSPW has used its "best efforts" to obtain access, and at every turn, has been met with delay and resistance by the City – whether in the form of non-responses to our proposed redlines to refusing to meet with us in person. Most recently, when we informed the City that we were concerned that negotiations were reaching an impasse and we wanted to meet one more time face-to-face to discuss access issues before bringing EPA into the discussions, the City agreed to meet with us on August 2, 2012 – a date we had previously reserved for broader discussions about the status of the Decree. The City's lawyers then unexpectedly cancelled just a few hours before our scheduled meeting time – on the day of the meeting – despite the fact that Company representatives had traveled all the way to Ashland to meet with City decision-makers in person.

The City's substantive positions related to access have been, in our view, equally as unreasonable. For example:

1. The City has demanded the opportunity to access the Site during performance of the Work, including entry into exclusion zones, but has not agreed to comply with basic safety requirements. Indeed, the City has indicated it wants to retain the right to "obtain samples" and "make measurements" during the active performance of the Work. In response, NSPW has asked the City to identify (up front) the representatives it wants to designate for entry and to verify to NSPW that these individuals will be properly trained and follow appropriate safety protocols. NSPW has emphasized repeatedly in negotiations that anyone entering the Site must be properly trained and equipped, as necessary and as required by the USEPA approved Site Health and Safety Plan (HASP). This is a safety issue and NSPW is not willing to risk that untrained and/or unequipped City personnel who enter the Site area may be harmed or may cause harm to others. NSPW has made great efforts to accommodate the City's request to access active work zones (despite NSPW's safety concerns), even going so far as to offer to pay<sup>1</sup> for a certain number of City employees to obtain HAZWOPER training. Despite this offer, the City has not yet accepted this proposal and the issue remains unresolved.
2. The City has also resisted terms and conditions that could be read to give the Company long term access for operation and maintenance of the Uplands remedy. The City apparently wants to negotiate an access agreement for the physical on-site construction work, and then another agreement concerning long-term O&M access. NSPW is unwilling to bifurcate the discussion and agree to limit its upfront access in any manner which limits its ability to comply with all of its obligations under the Decree. With

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<sup>1</sup> NSPW made this offer despite Par. 28 of the Decree that indicates the Company is not required to pay the City for access.

respect to this issue, the Company has offered language that reflects a commitment to minimize the impacts to Kreher Park and the interference of the public's long-term use that may occur during any long term O&M that must be conducted, where appropriate, and has also reminded the City that it could agree to take over long term O&M requirements if it prefers not to give NSPW long term access at the Site. Despite this offer, the City has not yet indicated its willingness to provide long term access.

3. The City is trying to resolve questions of Site liability in the access agreement rather than through settlement negotiations or contribution litigation. The City will not grant access unless NSPW indemnifies the City for certain liabilities related to the Site. At first, the City's demanded indemnification for all liabilities associated with the Site, even if caused as a result of the City's own negligence – something NSPW rejected out of hand. At present, the City is still demanding indemnification from any claims that performance of the Work results in "exacerbated" contamination conditions during the performance of the Work. The City wants NSPW to defend the City against third party claims where the City's negligence is the basis of the claim, and the City is asking for indemnification language that could limit NSPW's contribution claims against the City. Ultimately NSPW has made clear that while it will indemnify the City against claims that arise out of NSPW's negligent performance of the Work, it will not otherwise limit its contribution rights against the City in an access agreement.

The City is a PRP and has been sued for contribution by NSPW, and allocation of liability for the Site will be decided by the Court and should not be addressed in an access agreement. The parties have a shared interest in moving the Site into cleanup and redevelopment, and an access agreement can do that while questions of liability are addressed in the appropriate forum after a full airing of the facts. NSPW has already offered to indemnify the City for any third-party claims that arise out of NSPW's *negligent* performance of the work at the Site, but has insisted that the City should remain ultimately responsible for any third-party claims that arise due to the City's own negligence at the Site. Importantly, NSPW has also insisted that all traditional CERCLA contribution claims and defenses that the City and NSPW may have against each other shall be fully preserved and reserved and not be subject to conflicting indemnification language in a "subservient" access agreement. Despite this offer, the City has not been willing to agree to this favorable indemnity provision, and instead has demanded that NSPW provide an indemnification which could inappropriately and unfairly adjust liability for the Site, outside of the open and fair judicial process afforded by CERCLA. Regrettably, the City has indicated that unless NSPW agrees to *its* version of the indemnity language it will not further negotiate **any** other issues related to the access agreement. Obviously, the indemnification provision becomes even more important when the City maintains its desire to access the site during the performance of active Work, noted above.

4. The Decree clearly contemplates the development of an approved institutional control plan and the recording of those controls on the WDNR Database, including for property that is neither owned nor controlled by NSPW (See Pars. 27(a)(3) and 28). NSPW agrees

that the City can and should participate in that process, but the access agreement cannot be used as a veto hammer by the City to void that process. NSPW has offered the City participation in the development of the institutional control plan and has required that the City then implement those controls by registering the City property on the WDNR Database after approval by EPA. The City has refused to agree to the second step. Despite NSPW's attempts to resolve this issue in a way that complies with the requirements of the Decree, the City has been unwilling to agree that it will approve any future institutional controls that EPA determines are necessary for the Site. In short, the City has argued that all the Decree requires is that NSPW use best efforts to get the City to agree to register the City property on the DNR database. We do not read the decree in that way and indeed maintain that the access agreement must provide that the property will be so registered pursuant to the EPA approved institutional control plan. NSPW cannot agree to terms that are inconsistent with the Decree.

5. NSPW has proposed a permanent structures easement for purposes of any structures erected as part of the Work. NSPW is willing to work cooperatively with the City to ensure that any buildings erected in performance of the Work generally adhere to certain aesthetic and architectural standards referenced in the City's uniform building code. The City has demanded that all such structures go through the City's formal site plan submittal and architectural review/approval process. NSPW cannot agree to subject the Work to the City's various permit requirements where it could very well result in excess cost and delay, jeopardizing compliance with the Decree. CERCLA's permit waiver provisions were enacted to avoid that exact scenario, and NSPW will not agree to waive those statutory protections in the access agreement. NSPW has offered to consult with the City on these questions, and to ensure that reasonable aesthetic and architectural standards are substantively met by utilizing building materials referenced in the local codes, and has even offered to allow the City to go beyond and pay for any additional upgrades it desires to the extent those modifications do not interfere with the performance of the Work, but to date the City has refused this offer.

### Conclusion

NSPW commits that it will work cooperatively and expeditiously with the United States, WCL, the City, and WDNR to resolve the issues related to access and to perfect an access agreement. We will commit resources to this immediately, including in-person negotiation sessions. We believe our positions are reasonable and, in most cases, required by the terms and conditions of the Decree or under CERCLA. As we stated during the call, we are open to the suggestions of the United States in terms of next steps and a process for resolution.<sup>2</sup>

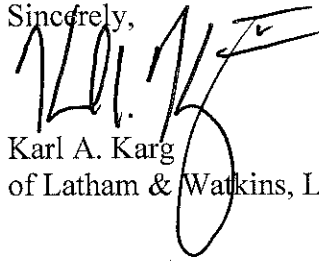
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As we indicated on the call, we had suggested to the City's attorneys that we take the handful of final open issues to the Agency to request assistance in bridging the gap. The City's position in response was that if NSPW were to pursue that course, then the City would "go back to our first draft" of the agreement and not recognize the mutual concessions reached along the way. We

Respectfully, we ask that the United States act quickly to resolve access at the Site. NSPW is eager to begin work at the Site, and winter is not far off as of this writing, particularly along the shore of Lake Superior. NSPW would like to make the most of the time we have left this season, and the sooner we can resolve access, the more time we'll have on Site this year. As discussed amongst the technical teams in Madison, Wisconsin, on August 22, it is our desire to gain access and *complete* the primary construction activities for the Phase I Project Area by the end of 2013 – which is important in terms of minimizing overall impact to the community. However, in order to keep to that schedule, we need access starting in October of **this year** to begin some pre-design investigation work and demolition activities. If we are unable to obtain access by October 2012, completion of construction activities could be delayed until June 2014. We ask the United States to act quickly so that we can avoid unnecessary delays in the implementation of the Decree. Importantly, to the extent that the City refuses to compromise and prevents NSPW from timely meeting its obligations under the Decree, we trust that the United States will agree that such a scenario will constitute a Force Majeure under the Decree, with no resulting stipulated penalties accruing to NSPW. If efforts by the United States to resolve the impasse fail, we respectfully urge the United States to utilize its authority under CERCLA to order the City to grant access so that cleanup may begin promptly. If you have any questions or require more information, please do not hesitate to contact us. Thank you for your consideration.

Sincerely,



Karl A. Karg  
of Latham & Watkins, LLP

cc: Kris Hess, WDNR

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believe this is patently unreasonable and evidences the City's approach to these discussions all along.